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Why The Fairness In Class Action Litigation Act Is Unjust

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Here we go again. H.R. 985 places a bull's-eye squarely on the back of every securities class action. It does so under the guise of attempting to fix a supposedly broken litigation system for class actions, which the bill's proponents allege is rife with abuse. But in fact this bill is designed to eliminate all class actions — including securities class actions. Not only is the "abuse" the bill's proponents claim exists illusory; they ignore the critical role securities class actions play in maintaining the integrity of our financial markets and providing recourse to investors, retirees, pension funds, health and welfare funds, states and municipalities invested in the market when fraud is committed.

H.R. 985 shot out of the House at record speed. In fact, the bill was introduced on a Thursday and voted out of committee the following Wednesday without so much as a hearing. The House voted along mainly party lines, with 14 Republican members joining all Democratic members in opposing the legislation. H.R. 984 is now in the Senate, before the Judiciary Committee, where one can only hope that Senators will reject this brazen attempt to close the courthouse doors.

There is much to say about H.R. 985. It shamelessly seeks to erect hurdles where none should exist, complicates class certification proceedings, buries the judiciary with class certification appeals and data collection and seeks to tie up the payment of attorneys' fees and require funding disclosures. This is all with a view to make cases much more difficult to litigate and take far longer to resolve than they do now, and disincentivize plaintiffs' firms from taking on these cases, thereby denying investors their ability to hold those who defraud them accountable.

Dr. Martin Luther King Jr., in his Letter from a Birmingham Jail, written on April 19, 1963, wrote "justice too long delayed is justice denied." The authors of H.R. 985 clearly disagree, inserting a provision in the proposed bill, § 1723, which permits guaranteed appeals from grants or denials of class certification and freezes the case in place during the pendency of the appeal. Court cases, especially class actions, already take a great deal of time and this proposed provision essentially adds a year or more to every single class action case — time where companies can hold onto their ill-gotten gains while victims are forced to wait. Quite simply, this is unjust.

Taking a step back, it's important to keep in mind the fundamental purpose of these cases. Securities fraud class actions provide investors with the ability to demand accountability and obtain recourse from companies and their executives who artificially prop up the value of company stock through lies, deception and half-truths. Innocent investors are the ones on the front line who see the value of their investments precipitously drop when facts known to or disregarded by management and hidden from the public, are revealed to the marketplace, through one means or another. At that point, the trading price of their investments drops as the truth leaks out, and the market adjusts to the true value of the stock, leaving investors who purchased the stock at the inflated prices with damages as their investments diminish in value.

Enter the securities class action, which provides investors a means to recover damages for the very real harm they suffered. Indeed, in some of these cases, investors have lost of all or most of their monies invested (think AIG, Lehman Brothers, Bernie Madoff and MF Global). Moreover, not to be forgotten, these cases sometimes bring about desperately needed corporate reform, changing the corporate environment that encouraged and/or allowed the fraudulent practices to fester. And of course, securities class actions provide deterrent value, as without the private bar's ability to fund these actions against well-heeled defendants, only the very wealthy or largest of pension funds with tens of millions of dollars in losses could bring a claim, leaving hundreds of thousands of investors without recourse or compensation.

The vital role that securities class actions serve in our regulatory system cannot be stressed enough. The U.S. Supreme Court, Congress and the U.S. Securities and Exchange Commission have all, at various times, gone on record recognizing the importance of private enforcement of the securities laws. The Supreme Court has ''repeatedly []emphasized that implied private actions provide 'a most effective weapon in the enforcement''' of the securities laws and are ''a necessary supplement to Commission action;''[1] in the House Report for the Private Securities Litigation Act, it was recognized that ''private lawsuits promote public and global confidence in our capital markets and help ... to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs'' and are ''an indispensable tool'' used to ''protect investors and to maintain confidence in the securities markets;'"[2] and in testimony before the Senate, then SEC Chairman Arthur Levitt recognized that ''[P]rivate rights of action are not only fundamental to the success of our securities markets, they are an essential complement to the SEC's own enforcement program.''[3]

In fact, the role of securities class action and private bar has, if anything, become even more important in today's regulatory scheme. The financial markets have continued to become increasingly global and complex, which the SEC, with its limited funding and staffing resources, is not able to come anywhere close to being able to police. In fact, the SEC is bracing itself for the prospect of dramatic funding cuts and restrictions under the Trump administration[4], further diminishing their role as "Wall Street cops" and increasing the need to ensure that securities class actions remain a viable means to rein in corporate fraud and provide investors with a means to recover damages.

An apples to apples comparison of monies recovered in one well known securities class action case, the massive Enron fraud, which also brought down blue chip accounting firm Arthur Andersen, provides a stark example of the benefits of securities class actions. In actions related to the Enron scandal, the SEC recovered $440 million, while private attorneys recovered around $7.3 billion for investors.[5] Moreover, in many cases, the private bar led the way. For instance, in the recent mortgage-backed securities scandals, private attorneys brought cases under the 1933 Act long before the SEC or other governmental agencies took action — if they did anything at all. For instance, in the New Jersey Carpenters Health Fund et al. v. Residential Capital LLC et al., 08-CV-8781 (HB) (S.D.N.Y.), private attorneys recovered $335 million for investors without any government action — without the securities class action, these investors would have recovered nothing at all.[6] This is actually typical since, even in cases where the SEC does levy fines or take action, the monies recovered generally do not go to harmed investors, but rather end up in the U.S. Treasury.

A telling measure of the onerous proposed bill is who is opposed to it. With respect to H.R. 985, plaintiffs' securities class action attorneys are joined by a wide variety of organizations in opposing the bill. First and foremost are other groups who would be severely harmed by its passage — specifically, approximately 120 civil rights organizations, 37 disability rights organizations, and over 80 consumer, environmental and workers' rights organizations oppose the bill. Perhaps even more impressively, neutral and august bodies like the American Bar Association also oppose H.R. 985. Finally, the House Liberty Caucus — the most conservative Republicans in the House of Representatives, has come out against H.R. 985, recognizing, in a March 9, 2017, letter, that the bill "benefits bad actors by making it significantly more difficult for persons to assert their rights through the court system."[7] If, in these polarized times, liberals and conservatives can unite on an issue — in this case opposition to H.R. 985, that says a great deal about the harm that H.R. 985 would do to our legal system.

In summary, in an Alice in Wonderland twist, the roles of victim and perpetrator are reversed under H.R. 985; the perpetrators of the fraud are treated as "victims" needing protection, while investors, whose lawyers put everything on the line to obtain recourse for them, are now the perpetrators. It was thinking like this, a form of caveat emptor, in the days before securities class actions and regulation, that helped cause the Great Crash of 1929. If passed in any form, this bill will wreak havoc on our current system of investor protection. In short, we can only hope that the Senate puts aside any partisan games, and sees H.R. 985 for what it is: a brazen attempt to shut down securities class actions to the detriment of the integrity of our capital markets and investors' ability to recover damages caused by those who perpetrate fraud.

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[1] J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964), quoting Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985). See also Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 778 (2008)(15 PBD, 1/24/08; 35 BPR 256, 1/29/08)(''private litigation under § 10(b) continues to play a vital role in protecting the integrity of our securities markets.'').

[2] H.R. Conf. Rep. No. 104-369, at 31(1995)

[3] S. Rep. No. 104-98, at 8 (1995), quoting SEC Chairman Arthur Levitt.

[4] https://www.bloomberg.com/news/articles/2017-03-06/wall-street-cops-reined-in-as-sec-braces-for-trump-budget-cuts

[5] Compare Securities and Exchange Comm'n, Enron (http://www.sec.gov/divisions/enforce/claims/enron.htm.) with Kristen Hays, ''Enron Settlement: $7.2

Billion to Shareholders,’’ Houston Chronicle, http://www.chron.com/business/enron/article/Enron-settlement-7-2-billion-to-shareholders-1643123.php. (Sept. 9, 2008).

[6] Cohen Milstein Sellers & Toll PLLC, where both authors are partners, served as Lead Counsel in this case.

[7] House Liberty Caucus Statement on H.R. 985, Fairness in Class Action Litigation Act of 2017 (Mar. 9, 2017).
